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SUPREME COURT, U.S.

81-5280

CASE NO.: _____

IN THE UNITED STATES SUPREME COURT

TERM: _____

ALLEN EUGENE LeMAY,
Appellant

State of Tennessee,

vs.

JAMES KEY ROBINSON, ALLEN EUGENE LEMAY, PATRICIA ANN PATTERSON

Coffee Criminal Action No.: 14,646
Coffee County Action No.: 79-12-II

JURISDICTIONAL STATEMENT
OR
APPEAL OF DEFENDANT
-ALLEN EUGENE LEMAY-

(From a Final Order of the Tennessee Supreme Court)

RESPECTFULLY SUBMITTED,

ROBERT L. HUSKEY

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Manchester, Tennessee 37355

Other Counsel of Record
In the State Court

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The foregoing Appendixes are attached hereto.

JURISDICTIONAL STATEMENT

(Questions Presented For Appeal)

(1) Was the incrimminating statement taken from the Defendant, Allen Eugene LeMay, by Law Enforcement Authorities while he was being held in custody as a "material witness", an unlawfully obtained statement and was the admission of same into evidence at the Trial prejudicial error?

(2) Was the search of the apartment of the Defendant which was conducted in violation of numerous Procedural Statutes of the State of Tennessee, unlawful and were the fruits of that search wrongfully admitted into evidence against the Defendant and was that admission prejudicial error?

(3) Was the search of the automobile of the Defendant, which was conducted in violation of numerous Tennessee Procedural Statutes, an unlawful search and thus, were the fruits thereof wrongfully admitted into evidence against the Defendant in his Trial and was that admission of evidence prejudicial error?

(4) Was the admission into evidence or reading into evidence of a statement of Co-Defendant, James Key Robinson, who did not testify at the Trial; which statement was blatantly incrimminating against the Defendant, Allen Eugene LeMay, prejudicial error; and, after the Court of Criminal Appeals determined that the admission of said statement was improper in the joint Trial of both James Key Robinson and Allen Eugene LeMay, should the Court have found the error to be prejudicial error and have granted a new Trial based thereupon?

(5) Was it prejudicial error for the Trial Court to admit into evidence the statement of the Defendant, Allen Eugene LeMay in an al-

tered or redacted form against and over his objection, and when the Court of Criminal Appeals determined that such action was error, should that Court have overturned the conviction or reduced the sentence of the said Defendant based thereupon?

(6) Was the admission into evidence of numerous enlarged photographs depicting the body of John Holland from various angles, showing in varying degrees, a bloody and gruesome exhibition of the condition of his body, prejudicial error, and after the Court of Criminal Appeals determined that their admission was without legal basis and error; did the Court of Criminal Appeals err in not overturning the conviction or in not reducing the sentence of said Defendant based thereupon?

(7) Were the comments of the Attorney General in his closing argument concerning the necessity of a long sentence to prevent the Defendants from returning to Coffee County and from bothering the Jurors, etc., prejudicial error; and did the Court of Criminal Appeals err after finding such to be error, after finding that the argument was improper, by not proceeding to reduce the sentence of the Defendant, Allen Eugene LeMay, based thereupon?

(Rulings of Lower Courts)

A copy of the Order and Ruling of the Tennessee Court of Criminal Appeals, filed August 27, 1980, and a copy of the Order of the Tennessee Supreme Court denying an Appeal to that Court, entered April 20, 1981, are attached as Exhibits to the Court's copy of the Notice of Appeal which is being filed herewith.

(Basis of Jurisdiction)

Defendant, Allen Eugene LeMay, was indicted by a Grand Jury

of Coffee County, Tennessee, for the offenses of Armed Robbery and Felony-Murder; thereafter, at his Trial in Coffee County, he was convicted by a Trial Jury of the offenses of Armed Robbery and Second-Degree Murder, receiving sentences of thirty (30) years and forty (40) years respectively, which sentences were thereafter adjudged by the Trial Court to run consecutive. The Defendant appealed his convictions and the sentencing to the Court of Criminal Appeals, State of Tennessee. The Court of Criminal Appeals overturned the double conviction as double jeopardy arising out of the Felony-Murder doctrine. The Court of Criminal Appeals agreed with the Appellant on many other matters raised in his Appeal and concurred that the error alleged by the Appellant did in fact occur in the Trial of the case and that such error violated the Appellant's Constitutional Rights, but concluded that same were not sufficient to overturn his conviction or reduce his sentencing other than as indicated above. From this Ruling of the Court of Criminal Appeals for the State of Tennessee, your Appellant sought and made proper application for an Appeal to the Tennessee Supreme Court. By Order entered the twentieth day of April, 1981, the Tennessee Supreme Court denied the Appellant's application for Appeal to that Court. Said Order constituting a Final Judgment of the highest Court of this State, from which your Appellant now appeals the decision to the United States Supreme Court. Appeal is made from the highest Court of this State to the United States Supreme Court pursuant to the authority of 28 U.S.C.S., Section 1257.

(Relevant Constitutional & Statutory Provisions)

"Unreasonable searches & seizures--The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

& seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment 4, United States Constitution

"Criminal Actions--Provisions concerning-- Due Process of Law & Just Compensation of this.-- No person shall be held to answer for a capitol, or other infamous crime, unless on a presetment or indictment by a Grand Jury, except in cases arising in the land or Naval Forces, in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without compensation."

Amendment 5, United States Constitution

"Rights of the Accused.--In all Criminal prosecutions, the accused shall enjoy the right to a speedy and public Trial, by an impartial Jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by Law, to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

Amendment 6, United States Constitution

"40-505. Issuance of Warrant.--If the Magistrate is satisfied of the existence of the grounds of the application, or that there is probable ground to believe their existence, he shall issue a Search Warrant signed by him, directed to the Sheriff, any Constable, or Peace Officer, commanding him forthwith to search the person or place named for the property specified, and bring it before the Magistrate."

Vol. 7A, T.C.A., 40-505

"40-507. Return Date.--A Search Warrant shall be executed and returned to the Magistrate by whom it was issued within five (5) days after its date; after which time, unless execution, it is void; and all Search Warrants in this State may be executed either in the daytime or in the nighttime."

Vol. 7A, T.C.A., Section 40-507

"40-508. Officer By Whom Executed.--The Warrant may be executed by anyone of the Officers to whom it is directed, but by no other person, except in aid of such Officer, at his request, he being present and acting in its execution."

Vol. 7A, T.C.A., Section 40-508

"40-516. Return of Papers To Court.--The Magistrate shall, if the property is not directed to be restored under the provisions of Section 40-515, annex together the Search Warrant, the returning and the Affidavits and return them to the Court having power to inquire into the case, in respect to which the Search Warrant was issued."

Vol. 7A, T.C.A., Section 40-516

"40-518. Copies of Search Warrant Required--Endorsement--Evidence.--All Magistrates, Clerks of Courts, Judges and any other person or persons whomsoever issuing Search Warrants shall prepare an original and two (2) exact copies of same, one (1) of which shall be kept by him as a part of his Official Record, and one (1) of which shall be left with the person or persons on whom said Warrant is served. The original Search Warrant shall be served and returned as provided by Law. The person or persons as aforesaid who issue said Warrants shall endorse the Warrants showing the hour, date, and name of the Officer to whom the Warrants were delivered for execution, and the exact copy of such Warrant and the endorsement thereon, shall be admissible in evidence in the Courts. Failure to comply with this Section shall make any Search conducted under said Warrant an illegal search & seizure."

Vol. 7A, T.C.A., Section 40-518

"40-806. Notice of Authority and Grounds for Arrest--Right to Complete Telephone Call Before being 'booked'.--When arresting a person, the Officer shall inform him of his authority and the cause of the arrest, and exhibit his Warrant if he have one, except when he is in the actual commission of the crime, or is pursued immediately after an escape.
No person under arrest by any Officer or private citizen shall have his name entered on any book, ledger, or any other record until such time as said person has successfully completed a telephone call to an attorney, relative, minister, or any other person that he shall choose, without undue delay. One hour shall constitute a reasonable time without undue delay. However, if the arrested person does not choose to make a telephone call, then he shall be 'booked' or docketed immediately."

Vol. 7A, T.C.A., Section 40-806

"40-1122. Witnesses Bound Over--On holding the Defendant to answer, the Magistrate shall take from each material witness examined by him on the part of the State a written undertaking in the sum of $250.00, to appear and testify, at the Court at which the Defendant is required to answer, on the second day of the term."

Vol. 7A, T.C.A., Section 40-112

"40-1124. Increase of Bond--Surety.--Whenever the Magistrate has good cause to believe that a witness for the prosecution will not appear to testify, he may require such witness to enter into a similar undertaking in a larger sum and with sufficient security."

Vol. 7A, T.C.A., Section 40-1124

"40-1126. Commitment of Witnesses.--Any witness required to enter an undertaking, with or without security, shall, on failure or refusal, be committed to jail."

Vol. 7A, T.C.A., Section 40-1126

(Facts Relevant To Questions Presented)

The facts surrounding all of the above issues together would be quite lengthy and really not need to be recited herein in order to sufficiently apprise the Court for the need of granting this application. The facts set forth in the Opinion of the Court of Criminal Appeals together with the comments included in their Ruling sufficiently set out the facts needed for an understanding of the issues. A copy of that Opinion is made an Exhibit to the Notice of Appeal which is attached hereto. In brief summary; however, your Appellant, Allen Eugene LeMay, would show unto this Honorable Court that he was indicted on a two (2) count Indictment for the offenses of Felony-Murder and Armed Robbery and was tried along with two (2) Co-Defendants, James Key Robinson and Patricia Ann Patterson. He was convicted of Second-Degree Murder and Armed Robbery and sentenced to forty (40) years for the Second-Degree Murder conviction and thirty (30) years for the Armed Robbery conviction. The Court of Criminal Appeals properly ruled that the conviction for both of these offenses constituted double jeopardy under the Law of this State as established by Briggs vs. State (1978) 573 S.W.2d 157. Based thereupon, the Armed Robbery conviction was set aside. In the Trial of the case, there was read into evidence, a statement taken from the Defendant, Allen Eugene LeMay, which statement was taken from him while he was being held as a "material witness", and not under arrest for any crime. The apartment and automobile of the Defendant, Allen Eugene LeMay, were searched, and the fruits of that search were admitted into evidence against him. The record clearly shows that the Investigating Officers being assisted by the Attorney General's Office and his Staff during the investigation, blatantly violated nearly everyone of the Procedural Requirements of the State concerning Search Warrants in the

obtaining and execution of the Search Warrants for the automobile and the apartment, yet the fruits of those searches were admitted into evidence. The Court of Criminal Appeals ruled that the admission of the above evidence, statements, and fruits of searches, were proper.

There were admitted into evidence and read into evidence statements of all three (3) Defendants. The only Defendant to testify was Patricia Patterson. The statement of James Key Robinson was very damaging and accusative against the Defendant, Allen Eugene LeMay, and in substance more or less stated that he, James Key Robinson was there at the victim's residence, and that the Defendant, Allen Eugene LeMay, did all of the wrongful actions. An attempt was made to redact the statements of the Defendants to delete references to the Co-Defendant; however, such attempt in the words of the Court of Criminal Appeals was a "total failure". There was even indication or statement in conversation between the Judge and the Sheriff in admitting one (1) of the statements of the Defendant that the blanks referred to the Defendant. The Court of Criminal Appeals quite properly ruled that the attempt to redact the statements was a "total failure", and was error and that the statements should have either been deleted entirely or individual Trials should have been granted to the Defendants. Yet, despite this finding of the Court of Criminal Appeals as to the error of the admission of these statements in redacted form, the Court held that it was harmless error and neither set aside the conviction of Allen Eugene LeMay nor reduced his sentence accordingly.

An admittingly novel issue; according to the Court of Criminal Appeals and according to the Trial Judge, was raised by the Defendant, Allen Eugene LeMay, in regard to his redacted statement. Said Defendant objected to his statement being admitted at all, but contended to the Court

that if it were going to be admitted into evidence, he wanted the entire statement as given admitted into evidence without alteration or redaction, contending that if it were going to be read to the Jury, he wanted to be able to draw whatever benefits were available through that statement by identifying the roles of the other parties therein and shifting the degree of guilt thereby. Despite his objection, the Trial Judge allowed the statement to be admitted in redacted form. The Court of Criminal Appeals properly ruled that he was entitled to have his entire statement presented to the Jury in the exact form that he gave it, and that it was error for the Court to do otherwise; however, there again, they held it was harmless error and neither overturned his conviction nor reduced his sentence accordingly.

In the Trial of the case, there was admitted into evidence a series of enlarged color photographs depicting in gory detail the bloody body of the deceased, John Holland. Those photographs were admitted over numerous objections by the said Defendant. The Court of Criminal Appeals properly ruled that the Defendant was correct in its objection, that the pictures were not relevant to prove any part of the prosecution's case and were not probative of any issue in dispute and that unquestionably, the admission of those photographs in the case was error. The only problem, then was that the Court of Criminal Appeals went on to say that despite the obvious error of the admission of these photographs, that the error was harmless and refused or failed to reduce the sentence based thereupon.

In his closing argument, the Attorney General, Charles S. Ramsey, argued that the sentence provided by Law for Armed Robbery and Murder; in essence, was not enough; that they (the Jury) should give the Defendants over a hundred years. Then, in a series of comments, went on to say that

they should give over a hundred years to make sure, and he pled with them not to give the Defendants the opportunity to come back and haunt "your family and my family and your friends and my friends". The Jury followed the request of the Attorney General and gave sentences which were in and around the one hundred year figure. The Jury recommended consecutive sentences and gave a total sentence to LeMay of seventy (70) years; to Patterson of eighty (80) years; and, to Robinson of one hundred, ten (110) years. The Defendant, LeMay, objected, but obtained no relief from the Trial Court. On Appeal, the Court of Criminal Appeals properly held that the comments about the returning to Coffee County were improper; yet, despite its obvious effect on the Jury, they failed to reduce or lessen the sentence of the said Defendant, Allen Eugene LeMay, based thereupon.

The matters raised herein were raised by the Defendant through his attorney in proper fashion in the Trial Court and then again to the Court of Criminal Appeals on Appeal.

Several matters exist in this case which warrant review by this Honorable Court. First of all, the very nature of the offenses and the convictions and the length of the sentences involved would tend to give rise to the need of review exercising this Court's Supervisory Authority. Next, there is a novel issue involved in Mr. LeMay's case of being questioned and his statement being taken from him while he was being held as a "material witness". The Tennessee Code defines specifically what a "material witness" is, and under what circumstance a person can be held as a "material witness". Yet, those circumstances were not present in this case. As far as this attorney can determine, there is no decision of record in this State dealing with the issue of a confession being taken while a man was being unlawfully held as a "material witness".

Numerous State statutes of procedural nature concerning the issue and execution of Search Warrants were blatantly violated by Law Enforcement Officials while being directly aided by personnel of the Attorney General's Office. To allow such to occur without redress to the Defendant, for all practical purposes serves to negate the very Statutes themselves, which Statutes are made in furtherance of the Constitutional Rights of the Defendant.

Finally, it would appear that there is simply too much "harmless error" in this case, and that this Court should review the actions of the Trial, Appeals, and Supreme Court of this State in toto to determine whether these various individual "harmless error" which in and of themselves might not have been sufficient to prejudice this case, but in total together have in fact prejudiced the Defendant's case and resulted in a considerably longer sentence being adjudged. In review of this case, the Court of Criminal Appeals found numerous blatant errors, including; in regard to Mr. LeMay, the wrongful admission of his statement in redacted form; the admission of the statement of a Co-Defendant who did not testify, which statement pointed the accusing finger directly at Mr. LeMay; the introduction into evidence of several enlarged color photographs which very obviously are tremendously inflammatory in nature and have absolutely no probative value; and an obviously improper argument of the Attorney General almost of a threatening nature designed to capitolize upon the fear and anguish instilled in the Jury after reviewing the prejudicial photographs and more or less telling them that if the Defendants don't stay in the Penitentiary a long time, they will come back here and this same thing might happen to you. Surely all of "harmless errors" together became harmful and thereby resulted in the very

lengthy sentence that was adjudged.

(Notice of Appeal)

As reflected by the attached copy of the Notice of Appeal, Notice of Appeal was filed with the Tennessee Supreme Court on the thirtieth day of ~~June, 1981~~ July 7, with a copy thereof being served upon the Attorney General for the State of Tennessee that same date by mail.

(Conclusion)

Based upon all of the foregoing factors, your Appellant would show that this case warrants review and consideration by this Honorable Court.

RESPECTFULLY SUBMITTED,

ROBERT L. HUSKEY

Tennessee Court-Appointed Attorney
For Allen Eugene LeMay
105 East High Street
Manchester, Tennessee 37355

* * *

CERTIFICATE OF SERVICE

I, Robert L. Huskey, certify that I have served a copy of the foregoing Jurisdictional Statement upon the Tennessee Attorney General, the Honorable William Leech, by mailing a copy of same to his office at 450 James Robertson Parkway, Nashville, Tennessee 37219, First Class Mail, postage pre-paid, this the 13th day of August, 1981.

ROBERT L. HUSKEY

81-5280

FILED
July 7, 1981
(confirmed by telephone)

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE, Plaintiff/ Appellee, vs. JAMES KEY ROBINSON, ALLEN EUGENE LEMAY & PATRICIA ANN PATTERSON, Defendants/ Appellants.	COFFEE CRIMINAL ACTION NO.: 14,646 C.C.A. No.: 79-12-II

NOTICE OF APPEAL
TO THE UNITED STATES SUPREME COURT

COMES NOW THE DEFENDANT-APPELLANT, Allen Eugene LeMay, by and through his Tennessee Court appointed attorney, and does hereby give Notice, pursuant to Rule No. 10 of the Revised Rules for the Supreme Court of the United States, that he does Appeal the Final Judgment in the subject case as rendered by the Tennessee Supreme Court on the twentieth day of April, 1981, whereby said Court denied his application for Appeal to that Court from the Court of Criminal Appeals of the State of Tennessee.

FOR A BRIEF STATEMENT of the nature of this Appeal, Defendant-Appellant, would show unto this Honorable Court that he was indicted by a Grand Jury of Coffee County for the offenses of armed robbery and felony-murder; thereafter, at his Trial, he was convicted by a Trial Jury of the offenses of armed robbery and second degree murder, receiving sentences of thirty (30) years and forty (40) years respectively, which sentences were thereafter, adjudged by the Trial Judge to run consecutively. The Defendant appealed his convictions and the sentencing to the Court of Criminal Appeals, State of Tennessee. The Court of Criminal Appeals granted part of the relief sought by the Appellant, but denied other relief. Criminal Appeals Court agreed with the Appellant that many of the matters that occurred in the Trial of the case were erroneaous and in violation of the Appellant's Constitional Rights, but concluded that same were not sufficient to overturn his conviction or reduce his sentencing. From this Ruling of the Court of Criminal Appeals for the State of Tennessee, your Appellant sought and made proper application for an Appeal to the Tennessee

ROBERT L. HUSKEY
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MANCHESTER, TENNESSEE 37355
TELEPHONE (615) 728-1800

Supreme Court. By Order entered the twentieth day of April, 1981, the Tennessee Supreme Court denied the Appellant's application for Appeal to that Court. Said Order constituting a Final Judgment of the highest Court of this State, from which your Appellant appeals the decision to the United States Supreme Court.

APPEAL IS MADE from this Court to the United States Supreme Court pursuant to the Authority of 28 USCS, Section 1257. For reference purposes, your Appellant is attaching to the copy of the Notice of Appeal, which is being sent to the United States Supreme Court, a copy of the Order of Ruling of the Tennessee Court of Criminal Appeals filed August 27, 1980 and a copy of the Order of the Tennessee Supreme Court, denying an Appeal to that Court entered April 20, 1981.

RESPECTFULLY SUBMITTED,

ROBERT L. HUSKEY

Tennessee Appointed Attorney for
Allen Eugene LeMay
105 East High Street
Manchester, Tennessee 37355

* * *

CERTIFICATE OF SERVICE

I, Robert L. Huskey, certify that I have served a copy of the foregoing Notice of Appeal upon the Tennessee Attorney General, the Honorable William Leach, 450 James Robertson Parkway, Nashville, Tennessee 37219; Honorable James L. Curtis, 1411 Parkway Towers, Nashville, Tennessee 37219; Honorable William B. Bruce, 1610 Parkway Towers, Nashville, Tennessee 37219; and, the original of the Notice has been filed with the Honorable Ramsey Leathers, Clerk of the Tennessee Supreme Court, Supreme Court Building, 401 Seventh Avenue, Nashville, Tennessee 37219; a copy of the Notice of Appeal has likewise been mailed to the Clerk of the United States, Supreme Court of the United States, Washington, D.C. 20543; all mailings, being First Class Mail, postage pre-paid, and mailed this the 30th day of June, 1981.

ROBERT L. HUSKEY

ROBERT L. HUSKEY
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105 EAST HIGH STREET
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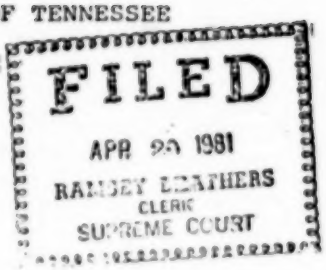
IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE



STATE OF TENNESSEE,	)	
	)	
Plaintiff-Appellee,	)	
	)	
	)	
vs.	)	Coffee Criminal
	)	No. 14,646
	)	C.C.A. NO. 79-12-II
JAMES KEY ROBINSON,	)	
ALLEN EUGENE LEMAY &	)	
PATRICIA ANN PATTERSON,	)	
	)	
Defendarts-Appellants.	)	

O R D E R

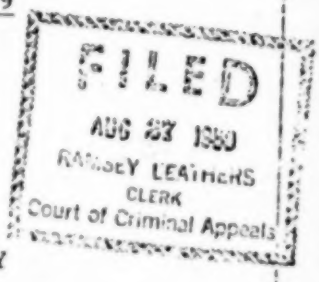
Upcn considerations of the applications for permission to appeal, briefs, and the entire record in this cause, it is the judgment of this Court that the applications should be and the same hereby are denied at the cost of appellants, the Court concurring in the results only.

PER CURIAM

JUDGMENT ENTERED THIS
DATE: AUG 27 1980
Ramsey Leathers, Clerk

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

NASHVILLE, DECEMBER SESSION, 1979



STATE OF TENNESSEE,

Appellee,

v.

JAMES KEY ROBINSON,
PATRICIA ANN PATTERSON and
ALLEN EUGENE LeMAY,

Appellants,

No. 14,646

COFFEE COUNTY

Hon. Gerald L. Ewell, Judge

(Murder, 1st and 2nd Degree)

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For LeMay:

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105 E. High Street
Manchester, Tennessee

ARMED ROBBERY JUDGMENTS VACATED
AFFIRMED AS MODIFIED

OPINION FILED: AUG 27 1980

CHARLES H. O'BRIEN, JUDGE

O P I N I O N

A two count indictment was returned against these defendants by the Grand Jury of Coffee County charging them in the first count with murder during the perpetration of a robbery, and in the second count with armed robbery. Robinson was found guilty of felony murder and sentenced to eighty (80) years in the penitentiary. On his armed robbery conviction he was sentenced to thirty (30) years confinement. Patterson was found guilty of second degree murder and sentenced to fifty (50) years. She was sentenced to thirty (30) years on her conviction for armed robbery. LeMay was also convicted of second degree murder and sentenced to forty (40) years confinement. He received a sentence of thirty (30) years in the State Penitentiary for armed robbery. A co-defendant, Andrea Rice, entered guilty pleas to second degree murder and armed robbery prior to the trial of these defendants and received respective sentences of twelve (12) years and ten (10) years confinement. All sentences were fixed to be served consecutively.

The incident leading to their convictions involved the homicide of a man named John Holland who resided in Tullahoma, Tennessee. Holland, a bachelor, about sixty years of age, was acquainted with the defendant, Patricia Ann Patterson. He was a man of some wealth. On the evening of April 6, 1977, these three defendants were in the apartment of Andrea Rice, in Nashville, where she and Allen Eugene LeMay lived together. There is some evidence that the other two defendants also inhabited the apartment on an intermittent basis. The four became engaged in a discussion which ultimately led to a comment from Robinson regarding his need for money. Holland's name was brought into the conversation and the view expressed that, due to his living habits and purported wealth, he would be a prime subject for robbery. They

prepared themselves for this venture by obtaining some ladies hose, to be cut and used as face masks, gloves, and Mr. Holland's unlisted phone number from the home where Patterson generally resided with her parents. Robinson carried a weapon referred to as a "buck knife", and LeMay was armed with a .22 caliber pistol. They proceeded to Tullahoma where the two women were able to gain entry into Holland's home through the device of pretending to be there for the purpose of Patterson introducing Rice to the victim. Once into the house one of them surreptitiously unlocked the kitchen door. Shortly thereafter the men burst in with stocking masks over their heads and demanded money of Holland. He told them all he had was in his wallet. Robinson then threw him to the floor, his hands were tied behind his back, and all four of the defendants ransacked the house. They found Seventy Dollars ($70.00) in cash, a number of weapons of various types, and a collection of coins. These items were loaded into the car by Patterson, LeMay and Rice while Robinson stayed behind for the express purpose of doing away with Mr. Holland in order to avoid identification by him of any of the four. The other three became impatient waiting for Robinson and LeMay reentered the house. Both men returned to the car shortly with neither wearing the stocking masks they had used for disguise. The next morning Holland was found dead. He had suffered two stab wounds in the chest and was strangled by a length of pantyhose wound around his neck. The medical proof indicated his death resulted from either or both of these causes.

As the result of some very astute police work the authorities were led first to Patterson. Further investigation uncovered the other defendants and brought about their arrest. Each of these defendants gave a statement implicating themselves in the homicide. Andrea Rice testified for the State and Patricia

Patterson testified in her own defense. Both of these witnesses implicated the other defendants as well as themselves by their testimony. Each was thoroughtly cross-examined, and their testimony was corroborated by other evidence in the record.

All three defendants have raised, in one fashion or another, the issue of double jeopardy on their conviction under a felony murder indictment on one count and a conviction of armed robbery as an underlying offense.

Considering first the conviction of James Key Robinson, who was found guilty of murder in the first degree and sentenced to eighty (80) years for that offense, we have concluded his sentence must be modified. In Miller v. State, 584 S.W.2d 758, (Tenn. 1979) our Supreme Court held that due to certain court decisions dealing with the constitutionality of the death penalty, specifically Collins v. State, 550 S.W.2d 643, (Tenn. 1977), that subsequent to January 24, 1977, until the enactment of Chapter 51, Public Acts of 1977, on April 11, 1977, all death penalty provisions of Acts going back to Chapter 181 of the Public Acts of 1915 were effectively invalidated. The Court held that in the interim period, during which the crimes involved in this case were committed, the legally effective punishment for first degree murder was life imprisonment. This being true we hold that so much of the verdict of the jury and judgment of the court in this case imposing upon Robinson a sentence of eighty (80) years in the penitentiary is in contravention of Article 1, Section 11, of the Constitution of the State of Tennessee, and is invalid in accordance with the ruling in Miller, supra. We modify the sentence imposed to life imprisonment.

A further modification of Robinson's sentence is necessitated by our Supreme Court's ruling in Briggs v. State, 573 S.W.2d 157, (Tenn. 1978). In accordance with the United

States Supreme Court decision in Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977), it was held that Briggs' dual convictions for felony murder and the underlying felony of armed robbery violated the double jeopardy provision of the Fifth Amendment to the Federal Constitution and also Article 1, Section 10 of the Tennessee Constitution, and the armed robbery conviction must be vacated. The jury in this case returned a general verdict of guilty of murder in the first degree, however, the indictment specifically charged felony murder. Robinson's conviction for the underlying felony of robbery must be vacated.

We find this to be equally true in the convictions of Patterson and LeMay for armed robbery. In *Briggs*, supra, our Supreme Court cited from *Harris v. Oklahoma*, supra, to the effect that:

> "When, as here, conviction for a greater crime, murder, cannot be had without conviction for the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction for the greater one. 433 U.S. at 682, 97 S.Ct. at 2912, 53 L.Ed.2d at 1056."

In this case the defendants were indicted for felony murder and for no other homicide offense. Of necessity the proof had to be that the homicide was committed during the perpetration of the underlying offense of armed robbery. It makes no difference that the jury determined the degree of culpability of these defendants to be less than that of Robinson by finding them guilty of second degree murder. They could not be found guilty of any degree of homicide, or any lesser included offense, except that for which they were indicted. It follows conclusively that under the authority of *Briggs v. State*, supra, the armed robbery conviction must be vacated and the second degree murder conviction affirmed. To do otherwise would create the anomalous situation of having the defendants found by the jury to be guilty of less culp-

able wrongdoing and sentenced to a far greater punishment than Robinson whom they found guilty of first degree homicide. This would be tantamount to denial of due process as well as a violation of the double jeopardy clause of the Fifth Amendment.

Each of the defendants take issue with the admission of a group of photographs depicting the body of Mr. Holland from various angles in the room where he was found. The pictures are, in varying degrees, bloody, gruesome exhibitions of the condition of the room and body of the deceased when it was first discovered. Objection was made to their admission on the basis that witnesses could testify about this evidence and that the enlarged photos had no probative value and would tend to inflame the jury. The trial judge overruled the objections and allowed the admission of the photographs, "in view of the nature of the charges involved" . . .

There was absolutely no valid reason given by the District Attorney General for the admission of the photographs in question. They were not relevant to prove any part of the prosecution case and were certainly not probative of any issue in dispute. Since the trial of this case our Supreme Court in State v. Banks, 564 S.W.2d 947, (Tenn. 1978), has set forth the criteria to be observed for the admission of photographs in trial proceedings. Unquestionably the admission of the photographs in this case was error. Equally without question is the fact that their admission was harmless error in view of the overwhelming evidence of the defendants' guilt. This was indeed a brutal, wanton murder as the pictures quite vividly reflect. The sentences meted out to the defendants were not inordinately excessive in the light of the gross circumstances of the homicide. As stated in Banks, supra, the circumstances fully explain and support the verdict of guilty and the severity of the sentence.

Each of the defendants object to the admission of statements given by them to the police authorities.

Defendant Robinson contends that the advice given him, prior to a statement taken from him by police officers, was incomplete relative to his rights against self-incrimination. He also says he was incompetent to give his statement because of ingestion of drugs and alcohol on the day he was arrested, and that his statement was taken from him without his having signed a waiver.

There were extensive pre-trial motions heard in this case including motions to suppress statements and confessions of the defendants. Evidence introduced at the pre-trial hearing on the motion to suppress established that Robinson was arrested by two Nashville Vice-Squad officers each of whom testified they saw no evidence that he was under the influence of any drug. They also testified he was advised of his Miranda rights subsequent to his arrest. He was transported from Nashville to Coffee County by another officer who testified he advised defendant of his Miranda rights before they left the Nashville Police Department. He also testified that defendant acted normal. He was again advised of his rights while in the vehicle and responded in the negative to an inquiry to determine if he wanted to answer any questions. At the Coffee County Jail after he had heard a tape recorded statement made by LeMay which implicated him in the murder Robinson made a phone call and then agreed to make a statement. The transcript of the statement includes that portion where he was advised of his rights and indicates he was not warned at that time that anything he said could be used against him. The transcript of his statement indicates he was well aware of his other Miranda rights, which he voluntarily waived, and agreed to make a statement. The officers testified he appeared normal at that time and

showed no evidence of intoxication. This defendant presented no evidence at the pre-trial suppression hearing. During the trial, in the course of a discussion among counsel regarding the proper method of redacting the confessions of the co-defendants, a protest was made regarding the admission of his statement because there was no signed waiver. In his motion for new trial Robinson challenged the admission of his statement on the grounds that he had never signed a written waiver and that the Miranda warnings he received were not complete. The manner of objecting to the admissibility of a confession in this State is a travel-worn path. The proper procedure is to conduct a hearing outside the presence of the jury, at the conclusion of which the trial judge determines the question of admissibility of the confession. See State v. Pursley, 550 S.W.2d 949, (Tenn. 1977). At such a hearing it is incumbent upon the parties to offer all of their proof on the issues. Shafer v. State, 381 S.W.2d 254, 214 Tenn. 416 (1964). At the pre-trial hearing in this case Robinson offered no proof on the issue of the voluntariness of his confession. The trial judge ruled that his statement was voluntarily given. There was no evidence offered to indicate otherwise./ Lack of an explicit written waiver of the right to remain silent or the right to counsel after Miranda warnings does not per se require exclusion of a confession if waiver can be found from facts and surrounding circumstances. See North Carolina v. Butler, 441 U.S. ____, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979). In view of the prior Miranda warnings received by this defendant we are satisfied there was a valid waiver. The ingestion of drugs and alcohol does not in and of itself render any subsequent confession involuntary. It is only when an accused's faculties are so impaired that the confession cannot be considered the product of a free mind and rational intellect that it should be suppressed. Lowe v. State, 584 S.W.2d 239, (Tenn.Cr.App. 1979). In this case there is no evidence that defendant's confession was not competently given.

Patterson made two statements on April 15, 1977 and a third on April 16th. She contends the officers refused to provide her with her required medication for epilepsy and this resulted in reducing her mental state to one of incoherency and disorganization bringing about a lack of memory which rendered her statements involuntary. She says the advice given her relative to her constitutional rights was inadequate and the malfunctioning tape recorder did not properly record the statement of April 16th in its entirety. There was a sharp conflict in the evidence on these issues at the suppression hearings. The officers testified that Patterson agreed to talk with them after being advised of her constitutional rights and gave two statements, one at 8:35 P.M. and the second at 9:20 P.M. on the 15th of April. Although these statements differ they were basically exculpatory. Later in the evening she asked for, and was given, permission to take her medication. She appeared lucid, coherent, and not under the influence of any drugs during the interview with the officers. The following morning at approximately 10:00 o'clock she was again advised of her rights and interviewed. A tape recording was made of this interview which reflected the advice given her relative to her constitutional rights, and her subsecuent waiver. During the interview she was permitted to take her medication. She was coherent, oriented, and did not appear to be under the influence of any drugs or narcotics. She was afforded comfort breaks during the interview. During the recording of her statement it was determined, after a refreshment break, that the recording device was inoperable due to weak batteries. A new recording device was substituted, the earlier interview was re-recorded on the new tape and questioning was resumed. Although Patterson contradicted this testimony the trial judge accredited the evidence in the record, including the testimony of the State's witness, concerning her mental capacity and the waiver of her constitutional rights.. His

findings have the weight of a jury verdict and will not be disturbed on appellate review unless the evidence preponderates against those findings. Owens v. State, 561 S.W.2d 167, (Tenn.Cr.App. 1977). Her claim of drug dependence, even if true, would not render her confession inadmissible or involuntary. See *Lowe v. State*, supra.

LeMay objects to the admission of his statement on the basis that it was taken by law enforcement authorities while he was being illegally detained as a material witness.

Soon after the police investigation led to Patricia Patterson events began to break quickly involving all four of these defendants in the Holland murder. On April 14th police questioned Patterson about another woman who was suspect in the homicide. Immediately after they left her place of employment she placed a call to the apartment where the others were staying. This call was traced and subsequently Metro detectives discovered the Rice automobile at that address. The description of the automobile fit that of the one seen at the Holland home on the night of the crime. Rice was the first of the four arrested. She was transported to Coffee County where she made a statement implicating the others. Search warrants for the automobile and the apartment were obtained and in the car they found a piece of pantyhose which ultimately was determined to be, through microanalysis, a part of the one used to strangle Holland. In the apartment they found a .38 caliber pistol which had been taken from the Holland house. That evening Patterson went to Metro Police Headquarters and gave two statements which, though intended to be exculpatory, contained sufficient inconsistencies to give the authorities probable cause to believe she had been involved in the murder. She was transported to Coffee County that same evening and the next day made a statement implicating herself and the other defendants. On April 16th LeMay was arrested and taken to Metro Police Head-

quarters. Due to the confusion there/an attempt to interrogate him about the Holland homicide was unsuccessful. He was then transported to Coffee County. There is some conflict in the record about whether or not he was charged with murder. There is no question but that he was aware he was being held in connection with the homicide. He talked freely about it enroute to Manchester. After his arrival he was again advised of his rights, signed a waiver, and gave a statement which was taped. Within approximately two hours after his arrest in Davidson County warrants were obtained against him and Robinson. Unquestionably the officers had probable cause to place him under arrest. The defendant is correct in his contention that he is entitled to be informed of the cause for his arrest. T.C.A. §40-806. But an arrest is not rendered unlawful by the fact that an officer who has authority to make an arrest for a particular offense erroneously states he is making an arrest for some other offense, or even for a cause which is not in fact an offense, or states the offense inaccurately. C.J.S., Volume 6A, Arrest, P. 112, note 84, and cited cases. Even if his arrest were illegal it would not affect subsequent statements and admissions voluntarily given by him after being advised of his constitutional rights. See State v. Hooper, 10 Ohio App.2d 229, 39 Ohio Ops.2d 435, 227 N.E.2d 414, cert denied, 389 U.S. 928, 19 L.Ed.2d 281, 88 S.Ct. 292.

Robinson and Patterson complain of denial of a severance. Each of the defendants raise the issue of a Bruton violation. In view of our belief that a Bruton violation occurred in admission of their separate confessions we consider the matter of severance in that context. Each of these three defendants gave a statement to the police. Patterson testified in the case and we need not be concerned about the admission of her statement. All three statements were redacted with the intent to delete any reference to the others. The statements were read to the jury, inserting

the word "blank" where the names of or reference to the others occurred. The attempt at redaction was a total failure. Both Robinson and LeMay admitted their own complicity in the robbery but endeavored to lay the blame on the other for the murder of Holland. There was no way that these statements could be introduced into evidence at a joint trial without the statement of one defendant implicating the other in the crime. If the State intended to use these confessions, as they obviously did, then a severance should have been granted. In Bruton v United States, 391 U.S. 123, 88 S Ct. 1620, 20 L.Ed.2d 476 (1968) the United States Supreme Court said, "Admission of a co-defendant's confession implicating a defendant at a joint trial constituted prejudicial error even though the trial court gave clear, concise and understandable instructions that confessions could only be used against the co-defendant and must not be regarded with respect to others on trial for the same offense." It was reiterated that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him, and to admit a co-defendant's confession at a joint trial in which that co-defendant did not take the stand was an abrogation of a defendant's constitutional right of confrontation, and a denial of the Fourteenth Amendment's guarantee of due process. Our own courts in Tennessee, while consistently following the rule that juries can be trusted to follow the trial court's instructions, have recognized the exception in Bruton cited from Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L Ed.2d 908 (1964) to the effect that there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. In Ellis v. State, 403 S.W.2d 293, 218 Tenn. 297 (1966), in an opinion by Justice Dyer the court commented on the exception to the rule on

the admission of a statement of a co-defendant where the circumstances were such that an instruction to the jury to disregard the confession would prove ineffective:

> " . . . As a general rule such statements are admissible if the trial judge properly instructs the jury, ... , not to consider them against defendants not present when such statements were made. (Citations omitted). In Stallard v. State, 187 Tenn. 418, 215 S.W.2d 807 (1948) this court cited with approval the following from 23 C.J.S. Criminal Law §935:
>
> > 'If one of several defendants jointly indicted has made admissions or confessions involving another defendant, the court may, in its discretion, order a separate trial, so that the admissions or confessions, while evidence against the one, may not prejudice the other, and where the circumstances are such that an instruction to disregard the confession of one when considering guilt of another would prove ineffective to eradicate the impression on the jury the severance should be granted, unless the prosecuting attorney expressly declares that such statements will not be offered in evidence on the trial, or unless all reference to the moving defendant is eliminated from the confession. 187 Tenn. 429, 215 S.W.2d 812.'"

In Taylor v. State, 493 S.W.2d 477, (Tenn.Cr.App. 1972), cert. denied 3/19/73, this Court reversed where the attempt at redaction of a confession of a non-testifying co-defendant was strikingly similar to the case sub judice. We noted in *Taylor* that all statements of non-testifying co-defendants were not inadmissible in evidence. *Properly altered to eliminate all connecting references to other defendants such a statement could be rendered unprejudicial.* (Emphasis ours). It was also noted that under circumstances of overwhelming proof of guilt elsewhere in the record admission of a co-defendant's statement, though error, could be held harmless error. In White v. State, 497 S.W.2d 751, (Tenn.Cr.App. 1973), citing from Commonwealth v. Scott, 355 Mass. 471, 245 N.E.2d 415, 419, 420, we reiterated that if the State possesses a confession made by a co-defendant out of the presence of others, it, " . . . should consider whether to introduce statements of individual defendants in joint trials or rather to refrain

from doing so or to consent to severance of the trials. Any other course involves serious risks that the trials will have been futile."

State v. Elliott, 524 S.W.2d 473, (Tenn. 1975) contains an important statement of the law on the rule in this State:

> "The Court of Criminal Appeals held in its majority opinion that 'the *Bruton* rule has no application where, as in the case before us, both of the jointly tried codefendants confessed,' citing O'Neil v. State, 2 Tenn.Crim.App. 518, 455 S.W.2d 597; Briggs v. State, 501 S.W.2d 831, (Tenn.Crim.App. 1973). We think this statement is an over-simplification of the impact of the *Bruton* rule. The fact that jointly tried codefendants have confessed precludes a violation of the *Bruton* rule where the confessions are similar in material aspects, which was the situation in both the *O'Neil* and the *Briggs* cases, *supra*. But where, the confession of one non-testifying codefendant contradicts, repudiates, or adds to material statements in the confession of the other non-testifying codefendant, so as to expose the latter to an increased risk of conviction or to an increase in the degree of the offense with correspondingly greater punishment, the latter codefendant is entitled to test the veracity of the statements in the confession of his codefendant. A denial to him of his right through the failure of his codefendant to take the stand brings the *Bruton* rule into play. . . ."

The court in *Elliott* found the error in the admission of the confession of the non-testifying co-defendant to be harmless in the light of the overwhelming evidence of guilt of the defendants, other than the confessions. There is no doubt that *Elliott* diluted somewhat our opinion in Gwin v. State, 523 S.W.2d 636, (Tenn.Cr.App. 1975), in which we held that in the total context of that case redacted statements, similar to those in this case, were admissible. The *Elliott* court also held that if error did exist it was harmless because of the cumulative nature of the evidence. In Alexander v. State, 562 S.W.2d 207, (Tenn.Cr.App. 1977), we were obliged to reverse in the light of a redacted statement where the substitution of the phrase "my friend" was made for the defendant's name each time it appeared in a co-defendant's statement. The court in *Alexander* did not instruct the jury that the co-defendant's statement could not be used to

determine the defendant's guilt or innocence. For this reason as well as others noted in the opinion we could not find harmless error.

We have cited extensively from the foregoing cases to point out, as lucidly as we can, that the only thing which saves this case from reversal is the same evidence in the record which makes the separate confessions of the non-testifying co-defendants inadmissible at a joint trial under any circumstances, whether redacted or not. We have first of all the testimony of the accomplice, Andrea Rice, which implicated each defendant in the murder and armed robbery of John Holland. Patterson also testified, implicating Robinson and LeMay. The testimony of these women was corroborated by other evidence all of which pointed so unerringly to the defendants that it was an impossibility for any juror to mistake the fact that the blanks in the redacted confessions referred only to them, and no one else. However, we are satisfied that the error which occurred in the admission of the redacted statements of Robinson and LeMay was rendered harmless by the overwhelming evidence of their guilt. The State has suggested that there was not any denial of confrontation in this case under the authority of Parker v. Randolph, ___U.S.___, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979), because the confessions of Robinson and LeMay were interlocking. As we stated earlier in this opinion each of the confessions endeavored to place the responsibility for the homicide upon the other defendant. For this reason we do not find the confessions to be interlocking and do not consider *Parker v. Randolph* to be applicable.

Two other reasons why redaction was ineffective and improper are apparent in this record. The first came about by inadvertence during the testimony of Sheriff Bobby McCullough of Coffee County. The State was endeavoring to introduce statements

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Each of the defendants complain about improper comments made by the District Attorney General during the voir dire examination and in final argument. They point out his request of the jurors to sentence defendants for one hundred years or over and to return a sentence sufficiently long to prevent them from returning to Coffee County to commit further offenses. Robinson specifically complains about the State's characterization of him as a moocher, or a pillheaded pimp. Patterson complains about a statement during the voir dire examination in which the District Attorney General commented that each of the three defendants had confessed to killing and robbing John Holland and his reference to her as a prostitute. When the prosecutor first made the comment about a hundred year sentence the trial judge interrupted him and instructed him to omit all references to any period of years of punishment. This action of the trial court was sua sponte, and was sufficient to avoid any prejudice to the defendants. See Buckingham v. State, 540 S.W.2d 660, (Tenn.Cr.App. 1976).

In reference to the comments relative to confessions by the defendants, the Attorney General asked the jury in essence if the State proved each of the three defendants confessed to killing John Holland, would they listen to the judge's charge and what effect they would give that [evidence]. The defendants objected and moved for a mis-trial. The court sustained their objection and commented that any reference to the fact that each defendant confessed to killing and robbing the victim would be improper. He then inquired of each individual juror if they understood that remarks by the prosecutor was not evidence and that they were to render a verdict based on the evidence only. Each juror indicated that he understood and could follow those instructions. The motion for mis-trial was overruled. This was sufficient to avoid prejudice to the defendants.

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It was clearly improper for the District Attorney General to argue that a long sentence was necessary to prevent the defendants from returning to Coffee County. Likewise, the name calling was inappropriate and certainly uncalled for. However, considering the nature of the crime involved and all the facts surrounding the homicide we have concluded that the improper conduct in closing argument by the prosecuting attorney did not affect the verdict to the prejudice of the defendantsand did not warrant reversal of the conviction. See State v. Sutton, 562 S.W.2d 820, p. 827, (Tenn. 1978).

Robinson and Patterson protest denial of a motion for a change of venue. There was both testimony of witnesses and demonstrative evidence introduced in support of this issue. A detailed recitation of this evidence is not essential. It is the law that an application for change of venue is addressed to the sound legal discretion of the trial judge, and requires a strong case of error and a clear case of abuse of that discretion to authorize a reversal. Swain v. State, 407 S.W.2d 452, 219 Tenn. 145 (1966). Although evidence at the pre-trial hearing disclosed that many of the people in the county, including prospective jurors, were familiar with some of the facts surrounding the crimes for which defendants were on trial, there was no evidence that this knowledge would require the conclusion that defendants could not have a fair trial. It is pertinent to note that even the witnesses presented on behalf of the defendants testified that they could render a fair and impartial verdict in the case based upon the evidence.

Both Robinson and Patterson take issue on denial of a motion for psychiatric evaluation under the provisions of T.C.A. §33-708(a).

Robinson's proof indicated he had been addicted to drugs for approximately three years. There was medical evidence that

he had suffered from a liver ailment and, after his incarceration in the Coffee County Jail, from withdrawal symptoms. There was also evidence of two earlier attempts at suicide by him. There was no evidence whatsoever that he was either incompetent to stand trial or that there was any question of his mental capacity at the time of the commission of the crime. T.C.A. §33-708 makes it discretionary with the trial judge to direct evaluation of an accused. See Graham v. State, 547 S.W.2d 531, (Tenn. 1977). Under the evidence in this case there was no abuse of the trial judge's discretion in denying Robinson a psychiatric evaluation.

Patterson's situation was somewhat different. It was established that she suffered from epilepsy and had a prescribed course of medication to maintain its control. She was granted a competency evaluation to determine if this prescribed medication would have any effect on her competency or sanity. The statute calls for examination at the Community Mental Health Center or by a licensed private practitioner designated by the Commissioner of Mental Health to serve the court. Patterson requested evaluation be performed at the Middle Tennessee Mental Health Institute rather than the Center designated by the statute and ordered by the trial judge. In the course of her evaluation she was informed by the doctor, who was completing the examination, that he might be called upon to testify at her trial. Patterson testified that the doctor raised his voice and threatened her with the possibility that he would be called to testify for the prosecution. The trial court declined to accept her version of the incident or to direct further evaluation at any other institution than that set forth in the statute. It was Patterson's prerogative to withdraw from the evaluation if she saw fit to do so, particularly on the advice of counsel. We have examined this record and find it completely devoid of the slightest credible evidence of any incom-

petency or insanity which would impair Patterson's ability to stand trial or which existed at the time of the offense. We find no prejudice in the trial court's ruling.

Patterson, individually, complains the trial court denied admission of testimony of two defense witnesses who would testify that both Robinson and LeMay made comments while they were in jail after their arrest to the effect that they should have killed her or intended to get rid of her after the homicide and robbery occurred. She says this should have been admissible testimony because the whole theory of her defense was that she acted under coercion and duress in participating in the robbery and murder.

In Hale v. State, 453 S.W.2d 424, 2 Tenn.Cr.App. 265 (1970), this Court held it to be reversible error to disallow testimony by a defendant of past conduct on the part of her husband to show that she acted in fear of him and was intimidated into participating in a burglary. The law in this State is that this is a valid defense insofar as robbery is concerned. Mallicoat v. State, 539 S.W.2d 54, (Tenn.Cr.App. 1976). Although Patterson said she was not aware of the homicide, or the intent of any of the others to kill Mr. Holland, until almost immediately before the actual occurrence, there is serious doubt about the admission of her own testimony in this regard, and we think the trial judge properly disallowed the testimony of Mr. Rowe and Mr. Stein, the proposed defense witnesses. In *Mallicoat*, supra, we stated that coercion and duress was not a defense to homicide, citing Leach v. State, 99 Tenn. 584, 42 S.W. 195 (1897), as authority. We pointed out that in order to constitute a defense to the commission of other crimes the coercion or duress must not only be present,imminent, and impending, but also the danger must be continuous throughout the time the act is being committed and

must be such that a defendant could not withdraw in safety. The doctrine of coercion or duress cannot be invoked as an excuse by one who had a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm and there must be no reasonable opportunity to escape the compulsion without committing the crime. The evidence was clear in this case that during the time the defendants were attempting to gain entry to Mr. Holland's house they left Patterson in their automobile to herself. There was no reason why she could not have driven off and abandoned them there, or reported the incident to the police. Moreover, after the robbery and homicide occurred, she spent several days in the company of her confederates. The theory of her defense was that she was afraid to leave them, however, during that interval she went to the Courthouse by herself on another matter and returned voluntarily to their company. When the police first interviewed her she was at work. When they left, she immediately called the apartment where she had been staying with Robinson, LeMay and Rice to inform them that the police had questioned her about the homicide. She was obviously free from their influence at that time as well as when she was finally taken into custody and gave two statements evading the truth about the occurrence of the crime and her participation in it. The trial judge denied admission of the testimony of the other witnesses on the basis that it could not reflect on Patterson's state of mind because she was not aware of it. This was a sound statement of the law and a proper reason for denying admission of the evidence. Although he did not do so the trial judge would have been justified in instructing the jury that coercion or duress is not a defense to the crime of homicide, and Patterson had the benefit of the fact that he did not do so. We find no error in the action of the trial judge in denying admission of the testimony.

Patterson filed a pre-trial motion to have herself removed from a jail cell she shared with co-defendant Andrea

Rice. She claims her incarceration in the same cell with Rice subjected her to duress and coercion. There is no evidence in this record to that effect or that her personal safety and welfare was endangered in any fashion. It appears the facilities in the Coffee County Jail were inadequate to provide these two female defendants with separate cells. We find no abuse of discretion on the part of the trial judge in not granting the motion to provide separate facilities for this defendant.

We find no merit to defendant Patterson's complaint that she should have been granted a continuance due to a surgical operation which was performed approximately a month prior to trial. She claimed that her medical condition detracted from her physical and mental ability to communicate with her counsel in the preparation of her defense.

There is no evidence that defendant was prejudiced in any fashion by the denial of the continuance. There was a period of three or four months prior to the operation in which she was not inhibited in any fashion from communicating with her counsel as a result of her physical condition. She was taken off any medication which might have a tendency to effect her mental acuity approximately two weeks prior to trial. The surgeon who performed the operation on her knee testified that he had never experienced problems in communication with her. In the absence of prejudice to the defendant we find no error.

Patterson claims prejudice on the method of jury selection. This charge is based on the action of the trial judge in changing the method of examination of prospective jurors. Initially individual examination of prospective jurors was permitted. In order to expedite the voir dire procedure the trial judge subsequently adopted the method of having twelve prospective jurors seated and examined together. This is an acceptable method of

jury selection in this State. State v. Jefferson, 529 S.W.2d 674, (Tenn. 1975). Defendant has failed to show in any manner how she was prejudiced by this change in procedure. Counsel has not complied with Tenn.R.App.Proc. No. 27(a)(6), requiring a statement of facts relevant to the issues presented for review with appropriate reference to the record; nor 27(g) requiring reference to the page where the error occurred in the voir dire examination which composes more than one thousand pages of this record.

LeMay complains of a search of the apartment in which he and the defendant Rice had lived together for some eighteen months prior to their arrest and also the search of an automobile registered in her name which was used by them jointly. He claims a violation of several of the search warrant statutes, particularly:

(a) He says the warrant was not returned to the same magistrate by whom it was issued in accordance with T.C.A. §40-507.

(b) The warrant was not executed by the officer to whom it was delivered as directed by T.C.A. §40-508.

(c) The warrant was not forwarded to Coffee County in accordance with T.C.A. §40-516-518.

(d) He says the warrant shows on its face that it was not executed until three days after the search of the apartment took place.

(e) He says the warrant for the search of the automobile shows on its face it was not executed until five days after the search of the vehicle.

We reject out-of-hand the State's contention that LeMay lacks standing to challenge the validity of either search. He lived in the apartment and was a joint user of the automobile. However we do not find any of LeMay's particularized complaints to have any merit. The evidence was undisputed that the warrant was executed by two Nashville detectives on the day of its issue, with two Coffee County Officers assisting in the search. Neither

the fact that the warrant was not returned to the same magistrate by whom it was issued, or the inaccuracy of the return made by the officers who made the search effects the validity of the search at the time it was made. Bowman v. State, 362 S.W.2d 255, 211 Tenn. 38 (1962). T.C.A. §40-505 provides that a warrant is directed to the sheriff, any constable, or any peace officer to make a search. T.C.A. §40-508 limits the execution of the warrant to any one of the officers to whom it is directed. The fact that it was delivered to a specifically named officer has no relevance so long as it was executed by any one of the officers to whom it was directed. State v. Pigford, 572 S.W.2d 921, (Tenn. 1978). There was unquestionably some delay in the return of the warrant to the Criminal Court by the magistrate in accordance with T.C.A. §40-516. These acts are no more than ministerial functions and cannot vitiate the validity of a lawful search. Smith v. State, 566 S.W.2d 553, (Tenn.Cr.App. 1978). The same is true of the inaccuracies by the officers in stating the date of execution and other information on the warrant. The evidence at the suppression hearing was that the search was properly conducted in accordance with the statutes. The improper return cannot negate the validity of an otherwise legal search.

The eighty (80) year sentence of James Key Robinson for first degree murder is modified to fix his sentence at life imprisonment. His conviction sentence of thirty (30) years imprisonment for armed robbery is vacated and set aside.

The armed robbery convictions for Patterson and LeMay, and their respective sentences for thirty (30) years each are vacated and set aside.

The murder convictions and sentences for Patterson and LeMay are affirmed.

CHARLES H. O'BRIEN, JUDGE

CONCUR:

JOHN K. BYERS, Judge

JERRY SCOTT, Judge

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IN THE

UNITED STATES SUPREME COURT

NO. 81-5280

ALLEN EUGENE LeMAY,

Appellant,

v.

STATE OF TENNESSEE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF TENNESSEE

MOTION TO DISMISS APPEAL

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ATTORNEY GENERAL OF TENNESSEE
NASHVILLE, TENNESSEE 37219

MAY IT PLEASE THE COURT:

The State of Tennessee moves this court pursuant to Rule 16.1(a) of the United States Supreme Court Rules to dismiss this appeal on the ground that the appeal is not within the Court's jurisdiction. The State contends that the judgment below did not draw in question the validity of a treaty or statute of the United States nor of the validity of a statute of the State of Tennessee on the ground that it was repugnant to the Constitution, treaties or laws of the United States. The provisions of 28 U.S. Code § 1257 provide, in pertinent part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against the validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) . . ..

The appellant's conviction for felony-murder was affirmed and his sentence modified; his armed robbery

conviction was vacated by the Tennessee Court of Criminal Appeals on August 27, 1980. A copy of the court's opinion is attached herewith. The Tennessee Supreme Court denied the appellant's application for permission to appeal on April 20, 1981. A copy of that order is also attached. At no time was the validity of any state statute drawn into question nor addressed by the Tennessee appellate courts. In the appellant's jurisdictional statement he sets forth seven questions presented for appeal, none of which drawn into question the validity of any state statute.

Accordingly, the appeal should be dismissed for the reasons stated.

Respectfully submitted,

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JUDGMENT ENTERED THIS
DATE AUG 27 1980
Ramsey Leathers, Clerk

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

NASHVILLE, DECEMBER SESSION, 1979

FILED
AUG 27 1980
RAMSEY LEATHERS
CLERK
Court of Criminal Appeals

STATE OF TENNESSEE,

Appellee,

v.

JAMES KEY ROBINSON, PATRICIA ANN PATTERSON and ALLEN EUGENE LeMAY,

Appellants,

No. 14,646

COFFEE COUNTY

Hon. Gerald L. Ewell, Judge

(Murder, 1st and 2nd Degree)

FOR APPELLEE:

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ARMED ROBBERY JUDGMENTS VACATED
AFFIRMED AS MODIFIED

OPINION FILED: AUG 27 1980

CHARLES H. O'BRIEN, JUDGE

O P I N I O N

A two count indictment was returned against these defendants by the Grand Jury of Coffee County charging them in the first count with murder during the perpetration of a robbery, and in the second count with armed robbery. Robinson was found guilty of felony murder and sentenced to eighty (80) years in the penitentiary. On his armed robbery conviction he was sentenced to thirty (30) years confinement. Patterson was found guilty of second degree murder and sentenced to fifty (50) years. She was sentenced to thirty (30) years on her conviction for armed robbery LeMay was also convicted of second degree murder and sentenced to forty (40) years confinement. He received a sentence of thirty (30) years in the State Penitentiary for armed robbery. A co-defendant, Andrea Rice, entered guilty pleas to second degree murder and armed robbery prior to the trial of these defendants and received respective sentences of twelve (12) years and ten (10) years confinement. All sentences were fixed to be served consecutively.

The incident leading to their convictions involved the homicide of a man named John Holland who resided in Tullahoma, Tennessee. Holland, a bachelor, about sixty years of age, was acquainted with the defendant, Patricia Ann Patterson. He was a man of some wealth. On the evening of April 6, 1977, these three defendants were in the apartment of Andrea Rice, in Nashville, where she and Allen Eugene LeMay lived together. There is some evidence that the other two defendants also inhabited the apartment on an intermittent basis. The four became engaged in a discussion which ultimately led to a comment from Robinson regarding his need for money. Holland's name was brought into the conversation and the view expressed that, due to his living habits and purported wealth, he would be a prime subject for robbery. They

prepared themselves for this venture by obtaining some ladies hose, to be cut and used as face masks, gloves, and Mr. Holland's unlisted phone number from the home where Patterson generally resided with her parents. Robinson carried a weapon referred to as a "buck knife", and LeMay was armed with a .22 caliber pistol. They proceeded to Tullahoma where the two women were able to gain entry into Holland's home through the device of pretending to be there for the purpose of Patterson introducing Rice to the victim Once into the house one of them surreptitiously unlocked the kitchen door. Shortly thereafter the men burst in with stocking masks over their heads and demanded money of Holland. He told them all he had was in his wallet. Robinson then threw him to the floor, his hands were tied behind his back, and all four of the defendants ransacked the house. They found Seventy Dollars ($70.00) in cash, a number of weapons of various types, and a collection of coins. These items were loaded into the car by Patterson, LeMay and Rice while Robinson stayed behind for the express purpose of doing away with Mr. Holland in order to avoid identification by him of any of the four. The other three became impatient waiting for Robinson and LeMay reentered the house. Both men returned to the car shortly with neither wearing the stocking masks they had used for disguise. The next morning Holland was found dead. He had suffered two stab wounds in the chest and was strangled by a length of pantyhose wound around his neck. The medical proof indicated his death resulted from either or both of these causes.

As the result of some very astute police work the authorities were led first to Patterson. Further investigation uncovered the other defendants and brought about their arrest. Each of these defendants gave a statement implicating themselves in the homicide. Andrea Rice testified for the State and Patricia

Patterson testified in her own defense. Both of these witnesses implicated the other defendants as well as themselves by their testimony. Each was thoroughtly cross-examined, and their testimony was corroborated by other evidence in the record.

All three defendants have raised, in one fashion or another, the issue of double jeopardy on their conviction under a felony murder indictment on one count and a conviction of armed robbery as an underlying offense.

Considering first the conviction of James Key Robinson, who was found guilty of murder in the first degree and sentenced to eighty (80) years for that offense, we have concluded his sentence must be modified. In Miller v. State, 584 S.W.2d 758, (Tenn. 1979) our Supreme Court held that due to certain court decisions dealing with the constitutionality of the death penalty specifically Collins v. State, 550 S.W.2d 643, (Tenn. 1977), that subsequent to January 24, 1977, until the enactment of Chapter 51, Public Acts of 1977, on April 11, 1977, all death penalty provisions of Acts going back to Chapter 181 of the Public Acts of 1915 were effectively invalidated. The Court held that in the interim period, during which the crimes involved in this case were committed, the legally effective punishment for first degree murder was life imprisonment. This being true we hold that so much of the verdict of the jury and judgment of the court in this case imposing upon Robinson a sentence of eighty (80) years in the penitentiary is in contravention of Article 1, Section 11, of the Constitution of the State of Tennessee, and is invalid in accordance with the ruling in Miller, supra. We modify the sentence imposed to life imprisonment.

A further modification of Robinson's sentence is necessitated by our Supreme Court's ruling in Briggs v. State, 573 S.W.2d 157, (Tenn. 1978). In accordance with the United

States Supreme Court decision in Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977), it was held that Briggs' dual convictions for felony murder and the underlying felony of armed robbery violated the double jeopardy provision of the Fifth Amendment to the Federal Constitution and also Article 1, Section 10 of the Tennessee Constitution, and the armed robbery conviction must be vacated. The jury in this case returned a general verdict of guilty of murder in the first degree, however, the indictment specifically charged felony murder. Robinson's conviction for the underlying felony of robbery must be vacated.

We find this to be equally true in the convictions of Patterson and LeMay for armed robbery. In Briggs, supra, our Supreme Court cited from Harris v. Oklahoma, supra, to the effect that:

> "When, as here, conviction for a greater crime, murder, cannot be had without conviction for the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction for the greater one. 433 U.S. at 682, 97 S.Ct. at 2912, 53 L.Ed.2d at 1056."

In this case the defendants were indicted for felony murder and for no other homicide offense. Of necessity the proof had to be that the homicide was committed during the perpetration of the underlying offense of armed robbery. It makes no difference that the jury determined the degree of culpability of these defendants to be less than that of Robinson by finding them guilty of second degree murder. They could not be found guilty of any degree of homicide, or any lesser included offense, except that for which they were indicted. It follows conclusively that under the authority of Briggs v. State, supra, the armed robbery conviction must be vacated and the second degree murder conviction affirmed. To do otherwise would create the anomalous situation of having the defendants found by the jury to be guilty of less culp-

able wrongdoing and sentenced to a far greater punishment than Robinson whom they found guilty of first degree homicide. This would be tantamount to denial of due process as well as a violation of the double jeopardy clause of the Fifth Amendment.

Each of the defendants take issue with the admission of a group of photographs depicting the body of Mr. Holland from various angles in the room where he was found. The pictures are, in varying degrees, bloody, gruesome exhibitions of the condition of the room and body of the deceased when it was first discovered. Objection was made to their admission on the basis that witnesses could testify about this evidence and that the enlarged photos had no probative value and would tend to inflame the jury. The trial judge overruled the objections and allowed the admission of the photographs, "in view of the nature of the charges involved" . . .

There was absolutely no valid reason given by the District Attorney General for the admission of the photographs in question. They were not relevant to prove any part of the prosecution case and were certainly not probative of any issue in dispute. Since the trial of this case our Supreme Court in State v. Banks, 564 S.W.2d 947, (Tenn. 1978), has set forth the criteria to be observed for the admission of photographs in trial proceedings. Unquestionably the admission of the photographs in this case was error. Equally without question is the fact that their admission was harmless error in view of the overwhelming evidance of the defendants' guilt. This was indeed a brutal, wanton murder, as the pictures quite vividly reflect. The sentences meted out to the defendants were not inordinately excessive in the light of the gross circumstances of the homicide. As stated in Banks, supra, the circumstances fully explain and support the verdict of guilty and the severity of the sentence.

Each of the defendants object to the admission of statements given by them to the police authorities.

Defendant Robinson contends that the advice given him, prior to a statement taken from him by police officers, was incomplete relative to his rights against self-incrimination. He also says he was incompetent to give his statement because of ingestion of drugs and alcohol on the day he was arrested, and that his statement was taken from him without his having signed a waiver.

There were extensive pre-trial motions heard in this case including motions to suppress statements and confessions of the defendants. Evidence introduced at the pre-trial hearing on the motion to suppress established that Robinson was arrested by two Nashville Vice-Squad officers each of whom testified they saw no evidence that he was under the influence of any drug. They also testified he was advised of his Miranda rights subsequent to his arrest. He was transported from Nashville to Coffee County by another officer who testified he advised defendant of his Miranda rights before they left the Nashville Police Department. He also testified that defendant acted normal. He was again advised of his rights while in the vehicle and responded in the negative to an inquiry to determine if he wanted to answer any questions. At the Coffee County Jail after he had heard a tape recorded statement made by LeMay which implicated him in the murder Robinson made a phone call and then agreed to make a statement. The transcript of the statement includes that portion where he was advised of his rights and indicates he was not warned at that time that anything he said could be used against him. The transcript of his statement indicates he was well aware of his other Miranda rights, which he voluntarily waived, and agreed to make a statement. The officers testified he appeared normal at that time and

showed no evidence of intoxication. This defendant presented no evidence at the pre-trial suppression hearing. During the trial, in the course of a discussion among counsel regarding the proper method of redacting the confessions of the co-defendants, a protest was made regarding the admission of his statement because there was no signed waiver. In his motion for new trial Robinson challenged the admission of his statement on the grounds that he had never signed a written waiver and that the Miranda warnings he received were not complete. The manner of objecting to the admissibility of a confession in this State is a travel-worn path. The proper procedure is to conduct a hearing outside the presence of the jury, at the conclusion of which the trial judge determines the question of admissibility of the confession. See State v. Pursley, 550 S.W.2d 949, (Tenn. 1977). At such a hearing it is incumbent upon the parties to offer all of their proof on the issues. Shafer v. State, 381 S.W.2d 254, 214 Tenn. 416 (1964). At the pre-trial hearing in this case Robinson offered no proof on the issue of the voluntariness of his confession. The trial judge ruled that his statement was voluntarily given. There was no evidence offered to indicate otherwise. Lack of an explicit written waiver of the right to remain silent or the right to counsel after Miranda warnings does not per se require exclusion of a confession if waiver can be found from facts and surrounding circumstances. See North Carolina v. Butler, 441 U.S. ____, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979). In view of the prior Miranda warnings received by this defendant we are satisfied there was a valid waiver. The ingestion of drugs and alcohol does not in and of itself render any subsequent confession involuntary. It is only when an accused's faculties are so impaired that the confession cannot be considered the product of a free mind and rational intellect that it should be suppressed. Lowe v. State, 584 S.W.2d 239, (Tenn.Cr.App. 1979). In this case there is no evidence that defendant's confession was not competently given.

Patterson made two statements on April 15, 1977 and a third on April 16th. She contends the officers refused to provid her with her required medication for epilepsy and this resulted in reducing her mental state to one of incoherency and disorganization bringing about a lack of memory which rendered her statements involuntary. She says the advice given her relative to her constitutional rights was inadequate and the malfunctioning tape recorder did not properly record the statement of April 16th in its entirety. There was a sharp conflict in the evidence on these issues at the suppression hearings. The officers testified that Patterson agreed to talk with them after being advised of her constitutional rights and gave two statements, one at 8:35 P.M. and the second at 9:20 P.M. on the 15th of April. Although these statements differ they were basically exculpatory. Later in the evening she asked for, and was given, permission to take her medication. She appeared lucid, coherent, and not under the influence of any drugs during the interview with the officers. The following morning at approximately 10:00 o'clock she was again advised of her rights and interviewed. A tape recording was made of this interview which reflected the advice given her relative to her constitutional rights, and her subsequent waiver. During the interview she was permitted to take her medication. She was coherent, oriented, and did not appear to be under the influence of any drugs or narcotics. She was afforded comfort breaks during the interview. During the recording of her statement it was determined, after a refreshment break, that the recording device was inoperable due to weak batteries. A new recording device was substituted, the earlier interview was re-recorded on the new tape and questioning was resumed. Although Patterson contradicted this testimony the trial judge accredited the evidence in the record, including the testimony of the State's witness, concerning her mental capacity and the waiver of her constitutional rights. His

findings have the weight of a jury verdict and will not be disturbed on appellate review unless the evidence preponderates against those findings. Owens v. State, 561 S.W.2d 167, (Tenn.Cr.App. 1977). Her claim of drug dependence, even if true, would not render her confession inadmissible or involuntary. See Lowe v. State, supra.

LeMay objects to the admission of his statement on the basis that it was taken by law enforcement authorities while he was being illegally detained as a material witness.

Soon after the police investigation led to Patricia Patterson events began to break quickly involving all four of these defendants in the Holland murder. On April 14th police questioned Patterson about another woman who was suspect in the homicide. Immediately after they left her place of employment she placed a call to the apartment where the others were staying. This call was traced and subsequently Metro detectives discovered the Rice automobile at that address. The description of the automobile fit that of the one seen at the Holland home on the night of the crime. Rice was the first of the four arrested. She was transported to Coffee County where she made a statement implicating the others. Search warrants for the automobile and the apartment were obtained and in the car they found a piece of pantyhose which ultimately was determined to be, through microanalysis, a part of the one used to strangle Holland. In the apartment they found a .38 caliber pistol which had been taken from the Holland house. That evening Patterson went to Metro Police Headquarters and gave two statements which, though intended to be exculpatory, contained sufficient inconsistencies to give the authorities probable cause to believe she had been involved in the murder. She was transported to Coffee County that same evening and the next day made a statement implicating herself and the other defendants. On April 16th LeMay was arrested and taken to Metro Police Head-

quarters. Due to the confusion there/an attempt to interrogate him about the Holland homicide was unsuccessful. He was then transported to Coffee County. There is some conflict in the record about whether or not he was charged with murder. There is no question but that he was aware he was being held in connection with the homicide. He talked freely about it enroute to Manchester. After his arrival he was again advised of his rights, signed a waiver, and gave a statement which was taped. Within approximately two hours after his arrest in Davidson County warrants were obtained against him and Robinson. Unquestionably the officers had probable cause to place him under arrest. The defendant is correct in his contention that he is entitled to be informed of the cause for his arrest. T.C.A. §40-806. But an arrest is not rendered unlawful by the fact that an officer who has authority to make an arrest for a particular offense erroneously states he is making an arrest for some other offense, or even for a cause which is not in fact an offense, or states the offense inaccurately. C.J.S., Volume 6A, Arrest, P. 112, note 84, and cited cases. Even if his arrest were illegal it would not affect subsequent statements and admissions voluntarily given by him after being advised of his constitutional rights. See State v. Hooper, 10 Ohio App.2d 229, 39 Ohio Ops.2d 435, 227 N.E.2d 414, cert denied, 389 U.S. 928, 19 L.Ed.2d 281, 88 S.Ct. 292.

4. Robinson and Patterson complain of denial of a severance. Each of the defendants raise the issue of a Bruton violation. In view of our belief that a Bruton violation occurred in admission of their separate confessions we consider the matter of severance in that context. Each of these three defendants gave a statement to the police. Patterson testified in the case and we need not be concerned about the admission of her statement. All three statements were redacted with the intent to delete any reference to the others. The statements were read to the jury, inserting

the word "blank" where the names of or reference to the others occurred. The attempt at redaction was a total failure. Both Robinson and LeMay admitted their own complicity in the robbery but endeavored to lay the blame on the other for the murder of Holland. There was no way that these statements could be introduced into evidence at a joint trial without the statement of one defendant implicating the other in the crime. If the State intended to use these confessions, as they obviously did, then a severance should have been granted. In Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) the United States Supreme Court said, "Admission of a co-defendant's confession implicating a defendant at a joint trial constituted prejudicial error even though the trial court gave clear, concise and understandable instructions that confessions could only be used against the co-defendant and must not be regarded with respect to others on trial for the same offense." It was reiterated that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him, and to admit a co-defendant's confession at a joint trial in which that co-defendant did not take the stand was an abrogation of a defendant's constitutional right of confrontation, and a denial of the Fourteenth Amendment's guarantee of due process. Our own courts in Tennessee, while consistently following the rule that juries can be trusted to follow the trial court's instructions, have recognized the exception in Bruton cited from Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964) to the effect that there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. In Ellis v. State, 403 S.W.2d 293, 218 Tenn. 297 (1966), in an opinion by Justice Dyer the court commented on the exception to the rule on

the admission of a statement of a co-defendant where the circumstances were such that an instruction to the jury to disregard the confession would prove ineffective:

> " . . . As a general rule such statements are admissible if the trial judge properly instructs the jury, ..., not to consider them against defendants not present when such statements were made. (Citations omitted). In Stallard v. State, 187 Tenn. 418, 215 S.W.2d 807 (1948) this court cited with approval the following from 23 C.J.S. Criminal Law §935:
>
> > 'If one of several defendants jointly indicted has made admissions or confessions involving another defendant, the court may, in its discretion, order a separate trial, so that the admissions or confessions, while evidence against the one, may not prejudice the other, and where the circumstances are such that an instruction to disregard the confession of one when considering guilt of another would prove ineffective to eradicate the impression on the jury the severance should be granted, unless the prosecuting attorney expressly declares that such statements will not be offered in evidence on the trial, or unless all reference to the moving defendant is eliminated from the confession. 187 Tenn. 429, 215 S.W.2d 812.'"

In Taylor v. State, 493 S.W.2d 477, (Tenn.Cr.App. 1972), cert. denied 3/19/73, this Court reversed where the attempt at redaction of a confession of a non-testifying co-defendant was strikingly similar to the case sub judice. We noted in *Taylor* that all statements of non-testifying co-defendants were not inadmissible in evidence. *Properly altered to eliminate all connecting references to other defendants such a statement could be rendered unprejudicial.* (Emphasis ours). It was also noted that under circumstances of overwhelming proof of guilt elsewhere in the record admission of a co-defendant's statement, though error, could be held harmless error. In White v. State, 497 S.W.2d 751, (Tenn.Cr.App. 1973), citing from Commonwealth v. Scott, 355 Mass. 471, 245 N.E.2d 415, 419, 420, we reiterated that if the State possesses a confession made by a co-defendant out of the presence of others, it, " . . . should consider whether to introduce statements of individual defendants in joint trials or rather to refrai

from doing so or to consent to severance of the trials. Any other course involves serious risks that the trials will have been futi

State v. Elliott, 524 S.W.2d 473, (Tenn. 1975) contains an important statement of the law on the rule in this State:

> "The Court of Criminal Appeals held in its majority opinion that 'the *Bruton* rule has no application where, as in the case before us, both of the jointly tried codefendants confessed,' citing O'Neil v. State, 2 Tenn.Crim.App. 518, 455 S.W.2d 597; Briggs v. State, 501 S.W.2d 831, (Tenn.Crim.App. 1973). We think this statement is an over-simplification of the impact of the *Bruton* rule. The fact that jointly tried codefendants have confessed precludes a violation of the *Bruton* rule where the confessions are similar in material aspects, which was the situation in both the *O'Neil* and the *Briggs* cases, *supra*. But where, the confession of one non-testifying codefendant contradicts, repudiates, or adds to material statements in the confession of the other non-testifying codefendant, so as to expose the latter to an increased risk of conviction or to an increase in the degree of the offense with correspondingly greater punishment, the latter codefendant is entitled to test the veracity of the statements in the confession of his codefendant. A denial to him of his right through the failure of his codefendant to take the stand brings the *Bruton* rule into play. . . ."

The court in *Elliott* found the error in the admission of the confession of the non-testifying co-defendant to be harmless in the light of the overwhelming evidence of guilt of the defendants, other than the confessions. There is no doubt that *Elliott* diluted somewhat our opinion in Gwin v. State, 523 S.W.2d 636, (Tenn.Cr.App. 1975), in which we held that in the total context of that case redacted statements, similar to those in this case, were admissible. The *Elliott* court also held that if error did exist it was harmless because of the cumulative nature of the evidence. In Alexander v. State, 562 S.W.2d 207, (Tenn.Cr.App. 1977), we were obliged to reverse in the light of a redacted statement where the substitution of the phrase "my friend" was made for the defendant's name each time it appeared in a co-defendant's statement. The court in *Alexander* did not instruct the jury that the co-defendant's statement could not be used to

determine the defendant's guilt or innocence. For this reason as well as others noted in the opinion we could not find harmless error.

We have cited extensively from the foregoing cases to point out, as lucidly as we can, that the only thing which saves this case from reversal is the same evidence in the record which makes the separate confessions of the non-testifying co-defendants inadmissible at a joint trial under any circumstances, whether redacted or not. We have first of all the testimony of the accomplice, Andrea Rice, which implicated each defendant in the murder and armed robbery of John Holland. Patterson also testified, implicating Robinson and LeMay. The testimony of these women was corroborated by other evidence all of which pointed so unerringly to the defendants that it was an impossibility for any juror to mistake the fact that the blanks in the redacted confessions referred only to them, and no one else. However, we are satisfied that the error which occurred in the admission of the redacted statements of Robinson and LeMay was rendered harmless by the overwhelming evidence of their guilt. The State has suggested that there was not any denial of confrontation in this case under the authority of Parker v. Randolph, ___U.S.___, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979), because the confessions of Robinson and LeMay were interlocking. As we stated earlier in this opinion each of the confessions endeavored to place the responsibility for the homicide upon the other defendant. For this reason we do not find the confessions to be interlocking and do not consider Parker v. Randolph to be applicable.

Two other reasons why redaction was ineffective and improper are apparent in this record. The first came about by inadvertence during the testimony of Sheriff Bobby McCullough of Coffee County. The State was endeavoring to introduce statements

made by defendant Patterson through his testimony when the following exchange took place in the presence of the jury:

> THE COURT: Okay. Go ahead Sheriff. If there is reference to anyone else in that statement omit that reference, Sheriff.
>
> SHERIFF McCULLOUGH: You're speaking of any other defendant?
>
> THE COURT: Yes Sir.

The second has been raised as an issue by LeMay who protested against the admission of his redacted statement. He argues that to admit his statement altered in any form from that originally given would be a violation of his right against self-incrimination. We agree. The only authority offered us on this issue is the case of Curry v. State, 397 S.W.2d 179, 217 Tenn. 257 (1965) submitted by the State. In that case the court held a defendant was entitled to admission of the entire contents of a statement he gave police except such portions as might not be relevant. In Espitia v. State, 288 S.W.2d 731, 199 Tenn. 696 (1956) in a somewhat more analogous case, the court, citing from various authorities, stated the law to be:

> "When a confession is admissible, the whole of what the accused said upon the subject at the time of making the confession is admissible and should be taken together; and if the prosecution failed to prove the whole statement, the accused is entitled to put in evidence all that was said to him and by him at the time which bears upon the subject of controversy including any exculpatory or self-serving declarations connected therewith. *It is for the jury to say what weight shall be given to the several parts of the statement, for they may well believe that part which charges the prisoner, and reject that which tends to exculpate him.*" (Emphasis in original text).

We say, on these issues too, that the error was harmless We find this to be particularly evident by the fact that LeMay was found guilty of second degree murder on the same evidence by which the jury convicted Robinson of homicide in the first degree.

Each of the defendants complain about improper comments made by the District Attorney General during the voir dire examination and in final argument. They point out his request of the jurors to sentence defendants for one hundred years or over and to return a sentence sufficiently long to prevent them from returning to Coffee County to commit further offenses. Robinson specifically complains about the State's characterization of him as a moocher, or a pillheaded pimp. Patterson complains about a statement during the voir dire examination in which the District Attorney General commented that each of the three defendants had confessed to killing and robbing John Holland and his reference to her as a prostitute. When the prosecutor first made the comment about a hundred year sentence the trial judge interrupted him and instructed him to omit all references to any period of years of punishment. This action of the trial court was sua sponte, and was sufficient to avoid any prejudice to the defendants. See Buckingham v. State, 540 S.W.2d 660, (Tenn.Cr.App. 1976).

In reference to the comments relative to confessions by the defendants, the Attorney General asked the jury in essence if the State proved each of the three defendants confessed to killing John Holland, would they listen to the judge's charge and what effect they would give that [evidence]. The defendants objected and moved for a mis-trial. The court sustained their objection and commented that any reference to the fact that each defendant confessed to killing and robbing the victim would be improper. He then inquired of each individual juror if they understood that remarks by the prosecutor was not evidence and that they were to render a verdict based on the evidence only. Each juror indicated that he understood and could follow those instructions. The motion for mis-trial was overruled. This was sufficient to avoid prejudice to the defendants.

It was clearly improper for the District Attorney General to argue that a long sentence was necessary to prevent the defendants from returning to Coffee County. Likewise, the name calling was inappropriate and certainly uncalled for. However, considering the nature of the crime involved and all the facts surrounding the homicide we have concluded that the improper conduct in closing argument by the prosecuting attorney did not affect the verdict to the prejudice of the defendantsand did not warrant reversal of the conviction. See State v. Sutton, 562 S.W.2d 820, p. 827, (Tenn. 1978).

Robinson and Patterson protest denial of a motion for a change of venue. There was both testimony of witnesses and demonstrative evidence introduced in support of this issue. A detailed recitation of this evidence is not essential. It is the law that an application for change of venue is addressed to the sound legal discretion of the trial judge, and requires a strong case of error and a clear case of abuse of that discretion to authorize a reversal. Swain v. State, 407 S.W.2d 452, 219 Tenn. 145 (1966). Although evidence at the pre-trial hearing disclosed that many of the people in the county, including prospective jurors, were familiar with some of the facts surrounding the crimes for which defendants were on trial, there was no evidence that this knowledge would require the conclusion that defendants could not have a fair trial. It is pertinent to note that even the witnesses presented on behalf of the defendants testified that they could render a fair and impartial verdict in the case based upon the evidence.

Both Robinson and Patterson take issue on denial of a motion for psychiatric evaluation under the provisions of T.C.A §33-703(a).

Robinson's proof indicated he had been addicted to drugs for approximately three years. There was medical evidence that

he had suffered from a liver ailment and, after his incarceration in the Coffee County Jail, from withdrawal symptoms. There was also evidence of two earlier attempts at suicide by him. There was no evidence whatsoever that he was either incompetent to stand trial or that there was any question of his mental capacity at the time of the commission of the crime. T.C.A. §33-708 makes it discretionary with the trial judge to direct evaluation of an accused. See Graham v. State, 547 S.W.2d 531, (Tenn. 1977). Unde the evidence in this case there was no abuse of the trial judge's discretion in denying Robinson a psychiatric evaluation.

Patterson's situation was somewhat different. .It was established that she suffered from epilepsy and had a prescribed course of medication to maintain its control. She was granted a competency evaluation to determine if this prescribed medication would have any effect on her competency or sanity. The statute calls for examination at the Community Mental Health Center or by a licensed private practitioner designated by the Commissioner of Mental Health to serve the court. Patterson requested evaluation be performed at the Middle Tennessee Mental Health Institute rather than the Center designated by the statute and ordered by the trial judge. In the course of her evaluation she was informe by the doctor, who was completing the examination, that he might be called upon to testify at her trial. Patterson testified that the doctor raised his voice and threatened her with the possibility that he would be called to testify for the prosecution. The trial court declined to accept her version of the incident or to direct further evaluation at any other institution than that set forth in the statute. It was Patterson's prerogative to withdraw from the evaluation if she saw fit to do so, particularly on the advice of counsel. We have examined this record and find it completely devoid of the slightest credible evidence of any incon

petency or insanity which would impair Patterson's ability to stand trial or which existed at the time of the offense. We find no prejudice in the trial court's ruling.

Patterson, individually, complains the trial court denied admission of testimony of two defense witnesses who would testify that both Robinson and LeMay made comments while they were in jail after their arrest to the effect that they should have killed her or intended to get rid of her after the homicide and robbery occurred. She says this should have been admissible testimony because the whole theory of her defense was that she acted under coercion and duress in participating in the robbery and murder.

In Hale v. State, 453 S.W.2d 424, 2 Tenn.Cr.App. 265 (1970), this Court held it to be reversible error to disallow testimony by a defendant of past conduct on the part of her husband to show that she acted in fear of him and was intimidated into participating in a burglary. The law in this State is that this is a valid defense insofar as robbery is concerned. Mallicoat v. State, 539 S.W.2d 54, (Tenn.Cr.App. 1976). Although Patterson said she was not aware of the homicide, or the intent of any of the others to kill Mr. Holland, until almost immediately before the actual occurrence, there is serious doubt about the admission of her own testimony in this regard, and we think the trial judge properly disallowed the testimony of Mr. Rowe and Mr. Stein, the proposed defense witnesses. In *Mallicoat*, supra, we stated that coercion and duress was not a defense to homicide, citing Leach v. State, 99 Tenn. 584, 42 S.W. 195 (1897), as authority. We pointed out that in order to constitute a defense to the commission of other crimes the coercion or duress must not only be present, imminent, and impending, but also the danger must be continuous throughout the time the act is being committed and

must be such that a defendant could not withdraw in safety. The doctrine of coercion or duress cannot be invoked as an excuse by one who had a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm and there must be no reasonable opportunity to escape the compulsion without committing the crime. The evidence was clear in this case that durir the time the defendants were attempting to gain entry to Mr. Holland's house they left Patterson in their automobile to herself. There was no reason why she could not have driven off and abandoned them there, or reported the incident to the police. Moreover, after the robbery and homicide occurred, she spent several days in the company of her confederates. The theory of her defense was that she was afraid to leave them, however, during that interval she went to the Courthouse by herself on another matter and returned voluntarily to their company. When the police first interviewed her she was at work. When they left, she immediately called the apartment where she had been staying with Robinson, LeMay and Rice to inform them that the police had questioned her about the homicide. She was obviously free from their influence at that time as well as when she was finally taken into custody and gave two statements evading the truth about the occurrence of the crim and her participation in it. The trial judge denied admission of the testimony of the other witnesses on the basis that it could not reflect on Patterson's state of mind because she was not aware of it. This was a sound statement of the law and a proper reason for denying admission of the evidence. Although he did not do so the trial judge would have been justified in instructing the jury that coercion or duress is not a defense to the crime of homicid and Patterson had the benefit of the fact that he did not do so. We find no error in the action of the trial judge in denying admission of the testimony.

Patterson filed a pre-trial motion to have herself removed from a jail cell she shared with co-defendant Andrea

Rice. She claims her incarceration in the same cell with Rice subjected her to duress and coercion. There is no evidence in this record to that effect or that her personal safety and welfare was endangered in any fashion. It appears the facilities in the Coffee County Jail were inadequate to provide these two female defendants with separate cells. We find no abuse of discretion on the part of the trial judge in not granting the motion to provide separate facilities for this defendant.

We find no merit to defendant Patterson's complaint that she should have been granted a continuance due to a surgical operation which was performed approximately a month prior to trial. She claimed that her medical condition detracted from her physical and mental ability to communicate with her counsel in the preparation of her defense.

There is no evidence that defendant was prejudiced in any fashion by the denial of the continuance. There was a period of three or four months prior to the operation in which she was not inhibited in any fashion from communicating with her counsel as a result of her physical condition. She was taken off any medication which might have a tendency to effect her mental acuity approximately two weeks prior to trial. The surgeon who performed the operation on her knee testified that he had never experienced problems in communication with her. In the absence of prejudice to the defendant we find no error.

Patterson claims prejudice on the method of jury selection. This charge is based on the action of the trial judge in changing the method of examination of prospective jurors. Initially individual examination of prospective jurors was permitted. In order to expedite the voir dire procedure the trial judge subsequently adopted the method of having twelve prospective jurors seated and examined together. This is an acceptable method of

jury selection in this State. State v. Jefferson, 529 S.W.2d 674, (Tenn. 1975). Defendant has failed to show in any manner how she was prejudiced by this change in procedure. Counsel has not complied with Tenn.R.App.Proc. No. 27(a)(6), requiring a statement of facts relevant to the issues presented for review with appropriate reference to the record; nor 27(g) requiring reference to the page where the error occurred in the voir dire examination which composes more than one thousand pages of this record.

LeMay complains of a search of the apartment in which he and the defendant Rice had lived together for some eighteen months prior to their arrest and also the search of an automobile registered in her name which was used by them jointly. He claims a violation of several of the search warrant statutes, particularly:

(a) He says the warrant was not returned to the same magistrate by whom it was issued in accordance with T.C.A. §40-507.

(b) The warrant was not executed by the officer to whom it was delivered as directed by T.C.A. §40-508.

(c) The warrant was not forwarded to Coffee County in accordance with T.C.A. §40-516-518;

(d) He says the warrant shows on its face that it was not executed until three days after the search of the apartment took place.

(e) He says the warrant for the search of the automobile shows on its face it was not executed until five days after the search of the vehicle.

We reject out-of-hand the State's contention that LeMay lacks standing to challenge the validity of either search. He lived in the apartment and was a joint user of the automobile. However we do not find any of LeMay's particularized complaints t. have any merit. The evidence was undisputed that the warrant was executed by two Nashville detectives on the day of its issue, with two Coffee County Officers assisting in the search. Neither

the fact that the warrant was not returned to the same magistrate by whom it was issued, or the inaccuracy of the return made by the officers who made the search effects the validity of the search at the time it was made. Bowman v. State, 362 S.W.2d 255, 211 Tenn. 38 (1962). T.C.A. §40-505 provides that a warrant is directed to the sheriff, any constable, or any peace officer to make a search. T.C.A. §40-508 limits the execution of the warrant to any one of the officers to whom it is directed. The fact that it was delivered to a specifically named officer has no relevance so long as it was executed by any one of the officers to whom it was directed. State v. Pigford, 572 S.W.2d 921, (Tenn. 1978). There was unquestionably some delay in the return of the warrant to the Criminal Court by the magistrate in accordance with T.C.A. §40-516 These acts are no more than ministerial functions and cannot vitiate the validity of a lawful search. Smith v. State, 566 S.W.2d 553, (Tenn.Cr.App. 1978). The same is true of the inaccuracies by the officers in stating the date of execution and other information on the warrant. The evidence at the suppression hearing was that the search was properly conducted in accordance with the statutes. The improper return cannot negate the validity of an otherwise legal search.

The eighty (80) year sentence of James Key Robinson for first degree murder is modified to fix his sentence at life imprisonment. His conviction sentence of thirty (30) years imprisonment for armed robbery is vacated and set aside.

The armed robbery convictions for Patterson and LeMay, and their respective sentences for thirty (30) years each are vacated and set aside.

The murder convictions and sentences for Patterson and LeMay are affirmed.

CHARLES H. O'BRIEN, JUDGE

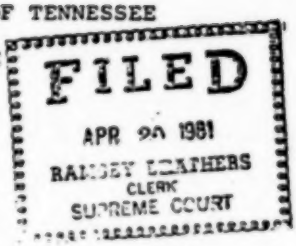
CONCUR:

JOHN K. BYERS, Judge

JERRY SCOTT, Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE



STATE OF TENNESSEE,	)	
	)	
Plaintiff-Appellee,	)	
	)	
	)	
vs.	)	Coffee Criminal
	)	No. 14,646
	)	C.C.A. NO. 79-12-II
JAMES KEY ROBINSON,	)	
ALLEN EUGENE LEMAY &	)	
PATRICIA ANN PATTERSON,	)	
	)	
Defendants-Appellants.	)	

O R D E R

Upon considerations of the applications for permission to appeal, briefs, and the entire record in this cause, it is the judgment of this Court that the applications should be and the same hereby are denied at the cost of appellants, the Court concurring in the results only.

PER CURIAM

K.D.

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IN THE UNITED STATES SUPREME COURT

Case No.: 81-5280

STATE OF TENNESSEE,

vs.

ALLEN EUGENE LeMAY.

COFFEE CRIMINAL ACTION NO.: 14,646

COURT OF CRIMINAL APPEALS DOCKET NO.: 79-12-II

ORIGINAL COPY

RESPONSE TO THE MOTION TO DISMISS APPEAL
FILED BY THE STATE OF TENNESSEE

COMES NOW YOUR Appellant-Petitioner, Allen Eugene LeMay, and for Response to the Motion filed by the State of Tennessee, would show unto this Honorable Court that utilization of the term Appeal in his jurisdictional statement and in other supporting documents filed with this Court is utilized in a general sense and makes particular reference in such documents to the Code Section authorizing bringing this matter before this Honorable Court, said provision being found in 28 USCS, 1257. The State in its' Motion cited the first two portions of the above cited Section but then left off the third Section which would be applicable herein. The terminology might more artfully be utilized as Appeal by Writ of Certiorari. Counsel for the Petitioner would apologize for his utilization of the terms. The State of Tennessee has according to its rules abolished the distinction in those types of Appeal by its current Appellate Rules and all Appeals beyond the Trial Court level are "Appeals" whereas previously there was a distinction between the two. Counsel for the Petitioner because of his practice in the State Court utilized the term Appeal in the general sense, but cited the Court and opposing Counsel to the particular Code Section to which he had referenced. Quite clearly under Sub-Section Three of the Code Section there is a basis for review of the action taken by the Tennessee Courts for quite clearly there is raised in our pleading, rights, privileges and immunities claimed under the Constitution as having been violated by the Court Proceedings. So quite clearly by the Constitutional issues, a number of them, being raised in the proceedings this matter is properly before this Court. Petitioner would therefore request that the Motion of the State of Tennessee be denied.

RESPECTFULLY SUBMITTED,

ROBERT L. HUSKEY

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IN THE

UNITED STATES SUPREME COURT

NO. 81-5280

ALLEN EUGENE LeMAY,

Appellant,

v.

STATE OF TENNESSEE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF TENNESSEE

AMENDED MOTION TO DISMISS APPEAL

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OF COUNSEL:

WILLIAM M. LEECH, JR.
ATTORNEY GENERAL

MAY IT PLEASE THE COURT:

The State of Tennessee has moved this court pursuant to Rule 16.1(a) of the United States Supreme Court Rules to dismiss this appeal on the ground that the appeal was not within the court's jurisdiction. The appellant has now filed a response thereto contending that his pleadings filed with this court mischaracterize the case as being an appeal and that this case should be treated as a petition for a writ of certiorari to the Tennessee Supreme Court.

Rule 20.1 of the United States Supreme Court Rules states that a petition for a writ of certiorari to review the judgment in a criminal case of a state court of last resort must be filed with the Clerk of the Court within sixty days after the entry of said judgment. In this case the Tennessee Supreme Court denied LeMay's application for permission to appeal on April 20, 1981. The appeal in the instant case was not docketed with this court until August 18, 1981, more than sixty days after the judgment of the state court of last resort.

Accordingly, because the petition was untimely filed it should be dismissed.

Respectfully submitted,

ROBERT A. GRUNOW
Deputy Attorney General

JOHN C. ZIMMERMANN
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-3231

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Amended Motion to Dismiss Appeal has been forwarded by first-class mail to Mr. Robert L. Huskey, 105 East High Street, Manchester, Tennessee 37355, on this 14th day of November, 1981.

JOHN C. ZIMMERMANN
Assistant Attorney General